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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/621,598	06/03/2004	Lisa Patrice Miller	MIL6136.01A	5025
8156	7590	09/25/2007		
JOHN P. O'BANION O'BANION & RITCHEY LLP 400 CAPITOL MALL SUITE 1550 SACRAMENTO, CA 95814			EXAMINER ROGERS, DAVID A	
			ART UNIT 2856	PAPER NUMBER
			MAIL DATE 09/25/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/621,598

Applicant(s)

MILLER, LISA PATRICE

Examiner

David A. Rogers

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 July 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 July 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. During examination of the applicant's continuation application (11/508,557) this application's prosecution history was reviewed to ensure that it was indeed copending. During the review it was noted that the abandonment was withdrawn on 02 November 2005. However, the status of the application was never updated to reflect the now-pending status, and examination on the merits was never undertaken. The present application has finally been updated, and the amendment filed 24 July 2006 in response to the notice of missing parts have been entered.

The Office apologizes for any inconvenience that this delay might have caused the applicant.

Priority

2. Acknowledgment is made of applicant's claim for foreign priority based on the following applications:

<u>Country</u>	<u>Application Number</u>	<u>Filing Date</u>
TAIWAN	092218021	10/16/2003
TAIWAN	092218020	10/16/2003
TAIWAN	092218023	10/16/2003
TAIWAN	092218022	10/16/2003
CHINA	200320100944.3	10/16/2003
CHINA	200320100942.4	10/16/2003
CHINA	200320100943.9	10/16/2003

It is noted that the applicant's oath/declaration filed 03 June 2004 states that certified copies of the foreign priority documents were included. However, a review of the application's file shows that certified copies of the

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above foreign applications are not present. The applicant is requested to file certified copies of the foreign documents in order to comply with requirements of 35 U.S.C. 119(b) and 37 C.F.R. 1.55(a)(2).

Double Patenting

3. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 1-20 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-20 of copending Application No. 11/508,557. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claim Rejections - 35 U.S.C. § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claim 1 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by United States Patent 5,492,246 to Bailey.

Bailey discloses a fluid intake tracker having a body (reference item 10), an intake indicator (reference item 36) mounted to the body, and an interior space that allows for the body to be reversibly coupled to a fluid container as seen in figure 1.

6. Claims 1, 4, 5, and 13 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by United States Patent 4,951,596 to Wallace, Jr.

Wallace, Jr. discloses a fluid intake tracker comprising a body (reference item 16), an intake indicator (reference item 44) mounted to the body, and a slot formed between two slightly thicker ends (reference item 18) that allows for the body to be reversibly coupled to a fluid container (reference item C) as seen in figure 1. The body, as shown, is generally a flexible, arcuate body with a C-shaped configuration. With regard to claims 4 and 5 Wallace, Jr. teaches that a strap or Velcro can be used to attach the indicator to the container. With regard to claim 13 Wallace, Jr. teaches that the device can be used as a promotional device. Therefore, the body would normally include promotional indicia; e.g., logos, brand names, etc. The container is disclosed by Wallace, Jr. to be a medical container. Official notice is hereby taken that medicines can be fluids.

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7. Claims 1, 6, 9-11, and 14-16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by United States Patent 6,252,494 to Howell.

Howell discloses a fluid intake tracker comprising an insulated foam sleeve body (reference item 23) and an electronic intake indicator (reference item 16, 28) mounted to the body. The insulated foam sleeve body is the means that allows for the body to be reversibly coupled to a fluid container as seen in figure 4B. See also column 4 (lines 42-48). Howell also discloses the use of user-settable timers and alarms (visual or audible) to serve as consumption reminders. See column 4 (lines 12-16).

Claim Rejections - 35 U.S.C. § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States Patent 6,457,616 to Gagne, United States Patent 5,823,496 to Foley *et al.*, Wallace, Jr., and Bailey.

Gagne teaches a user-wearable beverage holder having a cup (reference item 104) having a longitudinal slit (reference item 122) that allows the two halves of the holder to open to accommodate different-sized beverages. Once opened the holder will take on a generally c-shaped configuration.

Gagne does not expressly teach a foam layer on the inner surface of the holder. However, Foley *et al.* teaches that it is known to have a beverage holder (reference item 20) provided with a foam layer (reference item 34) in order to keep the beverages cool.

Gagne also does not teach a fluid intake tracker on the holder. Wallace, Jr. discloses a fluid intake tracker comprising a body (reference item 16) and an intake indicator (reference item 44) mounted to the body. Wallace, Jr. teaches that a strap or Velcro can be used to attach the indicator to the container. Official notice is hereby taken that fluids such as water can be known to be medically required and, therefore, the intake tracker of Wallace, Jr., would cover medical fluids such as water in a bottle. Furthermore, Bailey teaches that it is known to provide a intake tracker for monitoring water consumption.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Gagne with the teachings of Foley, *et al.*, Wallace, Jr., and Bailey in order to provide a portable beverage holder with an insulated sleeve and a fluid intake tracker so that a consumers can monitor their fluid intake while performing various outdoor activities and to also keep their beverage cool/warm.

10. Claims 1, 7, and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States Patent 6,073,796 to Mogil, Wallace, Jr., and Bailey.

Mogil teaches an insulated holder for a beverage. As seen in the figures the holder has zippers (reference item 62) for securing the holder to the container. The holder also has a handle (reference item 26) for carrying the holder/container and a collar (reference item 76). Mogil does not teach a fluid intake tracker on the holder.

Wallace, Jr. discloses a fluid intake tracker comprising a body (reference item 16) and an intake indicator (reference item 44) mounted to the body. Wallace, Jr. teaches that a strap or Velcro can be used to attach the indicator to the container. Official notice is hereby taken that fluids such as water can be known to be medically required and, therefore, the intake tracker of Wallace, Jr., would cover medical fluids such as water in a bottle. Furthermore, Bailey teaches that it is known to provide an intake tracker for monitoring water consumption.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Mogil with the teachings of Wallace, Jr. and Bailey in order to provide a fluid intake tracker on the holder of Mogil so that consumers can properly monitor their water consumption while outdoors.

11. Claims 12 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howell as applied to claims 9 and 14 above, and further in view of United States Patent 5793184 to O'Conner.

Howell teaches a fluid intake tracker operated by a battery. Howell does not teach the use of a solar cell for providing power.

O'Conner, however, teaches that solar cells are known to be used to providing power to a rechargeable battery.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Howell with the teachings of O'Conner in order to provide a solar cell to recharge the battery so that the time and expense of replacing batteries is avoided.

12. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Howell as applied to claim 14 above, and further in view of Wallace, Jr.

Howell teaches a fluid intake tracker having container for holding a fluid. Howell does not expressly show "promotional indicia" on the fluid intake tracker.

Official notice is hereby taken that it is well established that companies place promotional materials on consumer-related items. The addition of promotional indicia to the container is considered to be an obvious expedient to promoting a certain company, event, or brand. Furthermore, Wallace, Jr. teaches that an intake indicating device can be used as a promotional device. Therefore, the body would normally include promotional indicia; e.g., logos, brand names, etc.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Howell with the teachings of Wallace, Jr. in order to provide promotional indicia on the container in order to promote a certain company, event, or brand.

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13. Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over United States Patent 5,607,078 to Nordberg *et al.* in view of United States Patent 5,979,698 to Deal.

Nordberg *et al.* teaches a fluid intake tracker comprising container (reference item 10) having exterior and interior walls. The container has an indicator (reference item 28) and indicia (reference item 22) shown as numerals. The indicator is used to show the number of fluid intake events.

Deal teaches that it is known to provide a container (reference item 30) having a longitudinal slot (reference item 62) and a post (reference item 68) that slides in the slot. This configuration, as shown in figure 8, is an alternative embodiment to the indicator shown in figure 2.

Forming a slot in the sidewall of the container, as taught by Deal, would allow the number of intake events to be shown in the slot. Along the sides of the slot the total quantity scales (reference items 24 and 26 from Nordberg *et al.*) can be placed in order to provide the consumer with the indication of total fluid consumption. Conversely, one of the scales indicating total fluid consumption could be shown in the slot while the scale showing the number of fluid intake events can be located alongside the slot. In either case the functionality of indicating intake events and total intake quantity is preserved.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Nordberg *et al.* with the teachings of Deal in order to provide the indicator in a slot on the wall of the container so

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that the user's hand does not accidentally remove the indicator from the container.

14. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over Nordberg *et al.* and Deal as applied to claim 19 above, and further in view of Wallace, Jr.

Nordberg *et al.* teaches a fluid intake tracker having container for holding a fluid. Nordberg *et al.* does not expressly show "promotional indicia" on the fluid intake tracker.

Official notice is hereby taken that it is well established that companies place promotional materials on consumer-related items. The addition of promotional indicia to the container is considered to be an obvious expedient to promoting a certain company, event, or brand. Furthermore, Wallace, Jr. teaches that an intake indicating device can be used as a promotional device. Therefore, the body would normally include promotional indicia; e.g., logos, brand names, etc.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the teachings of Nordberg *et al.* and Deal with the teachings of Wallace, Jr. in order to provide promotional indicia on the container in order to promote a certain company, event, or brand.

Conclusion

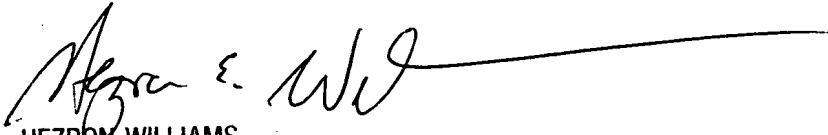
15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to David A. Rogers whose telephone number is (571) 272-2205. The examiner can normally be reached on Monday

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- Friday (0730 - 1600). If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hezron E. Williams can be reached on (571) 272-2208. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

16. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David Rogers/
Examiner - Group Art Unit 2856


HEZRON WILLIAMS
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 2800